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JAMES H. McKEN

BRIEF FOR APPELLANT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 50.

MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, *Appellant*

vs.

THE CITY OF COLUMBUS, L. H. CHAPPELL, MAYOR, ET AL.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

JOSEPH PACKARD,
LOUIS F. GARRARD,
JOHN I. HALL,
OLIN J. WIMBERLY,
Counsel for Appellant.

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No. 50.

MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, *Appellant*

vs.

CITY OF COLUMBUS, *Appellee.*

BRIEF FOR APPELLANT.

In this case the Mercantile Trust and Deposit Company of Baltimore, as trustee under the mortgage of the Columbus Water Works Company to secure its bonded indebtedness, filed a bill on December 22d, 1902, in the Circuit Court of the United States for the Western Division of the Northern District of Georgia, for the foreclosure of the mortgage and the appointment of a receiver. The City of Columbus having proceeded, in pursuance of an Act of the Legislature of Georgia passed December 3d, 1902, to take steps looking to the erection of a municipal water works system, the said Mercantile Trust Company of Baltimore, as trustee, on July 30th, 1903, filed in the same Court the original bill in this case for an injunction against the City, on the grounds that such action of the City constituted legislation impairing the obligation of the contract

of the City with the Water Works Company, which was part of the property conveyed to it as mortgagee; and was intended to deprive the bondholders of their property without due process of law; and for the specific performance of the said contract. The City, on the 11th of September, 1903, filed a demurrer upon the ground, amongst others, that the Court was without jurisdiction of the controversy, for that no federal question was presented, and independently of such question, that the requisite diversity of citizenship did not exist, after an alignment of parties according to interests as such interests appeared on the face of the bill. Thereafter the bill of complaint was by leave of the Court amended, and a demurrer was interposed by the City of Columbus to the bill as amended; said last mentioned demurrer being in addition to the demurrer theretofore filed by the same defendant.

The demurrer having been argued by counsel, the Court, on the 8th day of December, 1903, overruled said demurrer on each and every ground set forth therein, including the jurisdiction ground.

After answer and replication the case was referred to the Master, and evidence having been taken before him, he filed his report on the various questions of law and fact involved. To this report exceptions were filed by both parties and argument was had before the Court. Before briefs of argument were submitted and before a decision by the Court upon the questions raised by the exceptions, this Court decided the case of *City of Dawson vs. The Columbia Avenue Safe Deposit, &c. Company*, (197 U. S. 178,) whereupon the City of Columbus filed its motion to dismiss the bill, as amended, for want of jurisdiction, on the grounds following:—

First. Because there is no such diversity of citizenship as is requisite to sustain the jurisdiction of the Court; for that the Columbus Water Works Company, while nominally a defendant, should be aligned with the plaintiff according to interest, and the said Water Works Company is a corporation and citizen of the same State as the city of Columbus, defendant.

Second. Because there is no federal question involved on which the jurisdiction of the Court can be sustained independently of diversity of citizenship; for that the action of the city in proceeding to issue bonds for construction of its own system of water works constituted at most a mere breach of the contract, not equivalent to legislation affecting or impairing the obligation of the contract between the city of Columbus and the Columbus Water Works Company as assignee of Thomas R. White, in contravention of the Constitution and laws of the United States.

To this motion to dismiss for want of jurisdiction, the plaintiff, the Mercantile Trust and Deposit Company of Baltimore, filed its response, which was considered by the Court, and which the Court directed to be certified and sent up as a part of the record herein.

The Court being, at this stage of the case, of the opinion that it was without jurisdiction of the cause, for the reasons stated in said motion to dismiss, and that the motion to dismiss for want of jurisdiction should therefore be sustained, thereupon, by an order and decree made and entered on the 29th day of April, 1905, sustained the motion to dismiss on the grounds in said motion stated, and dismissed the said bill and the amendment thereto at the cost of the complainant. From this order and decree this appeal is taken.

There are eleven assignments of error. The first and seventh raise generally the question of error in sustaining the motion to dismiss and in not overruling the same. The second, fifth, ninth, tenth and eleventh present specifically the question of error on the part of the Court in deciding that no federal question was involved in the bill. The third, fourth and eighth present the question of error in deciding that the Court had no jurisdiction arising out of the diversity of citizenship. The sixth urges error in holding, on these two grounds combined, that there was no jurisdiction. The eighth and ninth assignments present, in fuller detail than elsewhere, the grounds relied on by the appellant as showing error of the Court below

in dismissing the bill for lack of diversity of citizenship and for lack of existence of a federal question, respectively, and the attention of the Court is therefore specially directed to these two assignments.

I.

EIGHTH ASSIGNMENT, AS TO DIVERSITY OF CITIZENSHIP.

Unlike the case of the *City of Dawson vs. The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company*, decided in this Court on March 6th, 1905, (197 U. S. 178) there had been no litigation between the appellant and the city of Columbus, or between the Columbus Water Works Company, mortgagor of the appellant, and the city of Columbus, prior to the institution by the appellant of the suit in the Circuit Court of the United States for foreclosure and receiver on December 22, 1902. That bill is part of the record in this case, and examination will show that, both in the foreclosure proceedings and in the original bill in this case,

> "the interest which the appellant represents is in no sense the same as that of the Columbus Water Works Company; but, on the contrary, is separate and distinct therefrom, and adverse thereto, and the relief which the appellant seeks is such as it is itself entitled to ask, and will redound directly and exclusively to the benefit of the bondholders which it represents as trustee, and not to the benefit of the Water Works Company."

It further appears from the response of the appellant to the motion of the city of Columbus to dismiss the original bill in this case for want of jurisdiction, that

> "the receiver of said Water Works Company, appointed by the Court in said foreclosure proceedings, since his appointment and qualification in December, 1902, up to the time of the filing of said motion to dismiss, spent more than $60,000 in enlarging, improving and perfecting said Water Works system; which said sum of $60,000 was provided

to the extent of more than one-half by the issue of receiver's certificates, which constitute a prior lien to that of the bonds for which appellant is trustee, and the residue was provided from income, which would otherwise have been payable to the holders of said bonds; and under the conditions brought about by the attitude and conduct of the City of Columbus, and existing at the time the present bill was brought, the property and franchises, rights and revenues of the said Water Works Company were not then, nor are the same now, of a value sufficient to pay off said sum of $60,000, and, in addition, pay the outstanding bonded indebtedness of $392,000, for which this appellant is trustee; and, by reason thereof, the bondholders for whom appellant sues as trustee are the only persons interested in the subject matter of said suit, and in the relief prayed by the bill; and appellant and all the bondholders were and are citizens and residents of States other than the State of Georgia, and there has been no collusion or contrivance in any of said litigation between this appellant and said Water Works Company of any sort or for any purpose whatsoever." (Record, page 70.)

All of the above having been duly set up and brought to the attention of the Court in and by said response, the appellant claims that, in view of the averments of the bill and of the uncontradicted averments of the response, the Court below erred in holding that there was an improper arrangement of parties, and that the bill should be dismissed for want of diversity of citizenship.

In the case now before the Court, we find a non-resident trustee for non-resident bondholders proceeding in a United States Court against a Georgia public-service corporation, to obtain possession of the property, which is security for the bonded indebtedness. Included in this property is a contract with a Georgia city. It becomes necessary for the trustee to take action to protect and enforce this contract, and it institutes

proceedings in the same United States Court against the city. The public-service corporation is joined as a party defendant, in order that the trustee may be subrogated to its rights under the contract. It is difficult to perceive how the diversity of citizenship is less clear in the second suit than in the first, or how the adverse position to the public-service corporation in the first suit is changed into a friendly position in the second. Such a claim for subrogation is, in itself, hostile.

> "Subrogation is not assignment. The most that can be said is, that the subrogated creditor, by operation of law represents the person to whose right he is subrogated. * * * The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the the mischief or reason of the law."
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> *New Orleans vs. Gaines' Admr.*, 138 U. S. 606.

The allegation of diversity of citizenship in this case is in the bill which is verified by affidavit.

Hawes vs. Oakland, 104 U. S. 453.

And there is nothing on the face of the bill, or elsewhere in the proceedings, to suggest collusion between the plaintiff and the Columbus Water Works Company, one of the defendants. In all the cases where the Federal Courts have refused to exercise jurisdiction on the ground that the allegation of diversity of citizenship was collusive, such collusion or contrivance has been clear and manifest. See, for instance, *Detroit vs. Dean*, 106 U. S. 541. In the present case the absence of any collusion, or of any reason for collusion, is manifest throughout.

Another important consideration is to be noted in this case. By the amendment to the bill now under review the appellant undertook to make any improvements or additions to the water works plant which might be deemed by the Court requisite to full compliance with the contract with the city of Columbus.

After the demurrer to the jurisdiction, upon the same grounds now urged, had been overruled, the Court, as already shown, by orders passed in the foreclosure suit, directed the receiver to make certain improvements in the plant, amounting to a large sum, at the expense of the bondholders. It admits of question whether, under all the circumstances, the precedents will support the claim that the bill for injunction and specific performance of the contract can be treated as an ancillary proceeding to the bill for foreclosure.

Root vs. Woolworth, 150 U. S. 411.

But, certainly, when the two cases are so closely linked together as in the present instance and action adverse to the complainant, growing out of the situation developed in the second suit, has been taken in the first suit where the jurisdiction of the Court is unquestionable, it would seem inequitable that afterwards jurisdiction in the second suit should be denied. The Court through its receiver, under a proceeding *in rem*, had possession of the property, including the contract which is in question here. It would seem proper that every intendment should be made to support the jurisdiction of the Court over this contract and the parties thereto.

II.

Ninth Assignment, as to the Federal Question.

It is submitted that the legislation set forth in this case as impairing the obligation of the contract, is clearly distinguishable from the legislation which, in *St. Paul Gas Light Company vs. St. Paul*, 181 U. S. 142, this Court held not to be such legislation as impaired the obligation of the contract in that case. The ordinances of the city of Columbus, set forth in paragraphs 17, 20 and 24 of the bill in this case, and the Acts of the General Assembly of Georgia, set forth in paragraphs 20 and 24 of the bill, (Record, pages 8, 10, 11), under and by virtue of which the action of the city of Columbus in proceeding to issue bonds for the construction of its own system of

water works was taken, clearly constituted legislation impairing the contract between the city and the water works company, and this contract the appellant, as trustee of the bondholders, was in duty bound to seek to uphold. This case is closely analogous in this respect to *Walla Walla vs. Walla Walla Water Company*, 172 U. S. 17. All the legislation embraced in the ordinances and Acts of the Legislature above mentioned was subsequent to the contract between the city of Columbus and the Columbus Water Works Company, as assignee of Thomas R. White, which was made on the 7th of October, 1881.

In paragraph sixteen of the bill in this case (Record page 7,) it appears that under the contract in question, the city of Columbus granted to the Water Works Company the exclusive privilege of maintaining and operating water works in said city for a period of thirty years or until such time as they might be purchased by the city under terms of arbitration as to value, provided in said contract. This is in effect a stronger provision than those of which this Court said in the *Walla Walla* case, page 17:

> "They amount simply to this; that if the city should desire to establish water works of its own it would do so by condemning the property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith." (Page 17.)
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> "Cases are not infrequent where under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a par-

ticular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party." (Page 18.)

At the time of the contract with White in 1881, the exclusive feature of the contract had been held legal by the decisions of the highest Court of Georgia. (See opinion of Court below, Record, page 60.)

Even if, as in the case of *Vicksburg Water Works Co. vs. Vicksburg*, 185 U. S. 81, we lay aside the Act of the Legislature of Georgia, passed on December 3d, 1902, the ordinance of the city of Columbus passed on September 14th, 1902, and the subsequent ordinances giving effect thereto, "disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract," to use the language of this Court in the *Vicksburg* case. See also—

New Orleans Water Works Co. vs. Rivers, 115 U. S. 680.

Such an ordinance "may properly be considered a law within the meaning of the article of the Constitution of the United States."

New Orleans Water Works Co. vs. Louisiana Sugar Refining Co., 125 U. S. 31.

St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 148 and cases cited.

Even in the case of an appeal from the highest State Court, this Court will determine for itself "as to the existence and meaning of the alleged contract, in order to determine the ques-

tion whether subsequent legislation has impaired the obligation thereof."

Capital City Light &c. Co., vs. Tallahassee 186 U. S. 406.

It is respectfully submitted that the Federal Court had jurisdiction based upon the allegations of the bill, even though it be held that the Columbus Water Works Company should have been aligned as plaintiff. It would have had such jurisdiction, even though all the parties had been citizens of Georgia. "All that is necessary to establish the jurisdiction of the Court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair." Such is the language of this Court where all the parties were citizens of the same State.

City Railway Co. vs. Citizens Railway Co., 160 U. S. 673.

Walla Walla vs. Walla Walla Water Co, 172 U. S. 7.

New Orleans Water Works Co. Rivers, 115 U. S. 680.

"The easement is a legislative grant, whether made directly by the Legislature itself or by any one of its properly constituted instrumentalities. * * * Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith and was not a frivolous one."

City Railway Co. vs. Citizens Railroad Co., supra.

Where the bill properly sets forth a contract granting exclusive rights to furnish water, and that the action of the city tends

to impair the obligation of such contract, the case is one where the Federal Courts have jurisdiction without regard to the citizenship of the parties.

Knoxville Water Co. vs. Knoxville, 200 U. S. 22.
Vicksburg v. Vicksburg Water Works Co., 202 U. S. 453.
Vicksburg Waterworks Co. vs. Vicksburg, 185 U. S. 65.

Respectfully submitted,

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